

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In the Matter of Conservation District Use)	DLNR File No. HA-02-06
Application for)	
)	BOARD OF LAND AND NATURAL
UNIVERSITY OF HAWAII INSTITUTE)	RESOURCES' DECISION GRANTING
FOR ASTRONOMY)	CONSERVATION DISTRICT USE
)	PERMIT
to construct and operate six 1.8-meter)	
Outrigger Telescopes (CDUP application HA-)	
3065) within the summit area of the Mauna)	
Kea Science Reserve, District of Hāmākua,)	
Island of Hawai'i)	
)	

BOARD OF LAND AND NATURAL RESOURCES' DECISION GRANTING
CONSERVATION DISTRICT USE PERMIT FOR THE CONSTRUCTION AND
OPERATION OF SIX 1.8-METER OUTRIGGER TELESCOPES
WITHIN THE SUMMIT AREA OF THE MAUNA KEA SCIENCE RESERVE

Mauna Kea's summit area is unique and one of the most special places on earth. To astronomers worldwide, Mauna Kea is exceptional in its quality for astronomical observation. In Native Hawaiian culture, Mauna Kea is a focal point of spiritual and cultural significance, a home of deities, a place of spiritual connection with one's ancestors, history, and the heavens. Mauna Kea, more than any other place, presents the Board with an inexorable duty to conserve, protect, and preserve this unique and most special resource.

The application that is the subject of this contested case proceeding is for a permit to construct and operate six outrigger telescopes that, in combination with the existing Keck I and Keck II telescopes, will help astronomers to detect the presence of planets like our own, as a step toward answering the question whether there is other life in the universe or whether we are alone.

We can appreciate the wonder and excitement of the possibilities fueled by this project, and nothing that was presented in the contested case proceedings detracts from that. In reviewing the file in this contested case, however, it is clear that this case is not about the merits of astronomy or the importance of the outrigger telescope project to modern science.

Nor is this case about whether we value astronomy over Native Hawaiian culture, progress in modern scientific knowledge over ancient traditions, or vice versa. We believe that these diverse interests can be accommodated.

The crux of this case is about the ability to appropriately and adequately manage uses on conservation district lands within the Mauna Kea science reserve so as to ensure the conservation, protection, and preservation of our important natural and cultural resources.

The Board has concluded that, with the conditions imposed, we can fulfill our duty to conserve, protect and preserve our important natural and cultural resources while letting the project go forward. The attached findings of fact and conclusions of law set forth in detail the bases upon which our conclusion is drawn; and the decision and order spell out all of the conditions upon which this permit is issued.

Here we discuss a few issues that warrant additional explication, in narrative form, of the Board's decision.

More Effective Management

The proposed project is to construct the outriggers on the site where the two Keck telescopes already exist, a site that has already been disturbed. To ensure the conservation, protection and preservation of our important natural and cultural resources, the board is obligated to consider the impacts of this particular project in cumulation with impacts that already exist.

Evidence presented in this case raises significant concerns about the adequacy of current management efforts in ensuring the protection of natural and cultural resources within the science reserve. We would not be upholding our duty to protect the State's natural and cultural resources by adding to the management tasks unless we can be assured of more appropriate and effective management practices than are currently in place. In short, we do not believe that the cumulative impacts can be mitigated under the present management structure.

We recognize that the University has recently taken some steps in addressing some of the past problems through the establishment of the Office of Mauna Kea Management (OMKM) and the ranger program. However, OMKM's current responsibilities and the ranger program do not completely address our management concerns. From the testimony of Bill Stormont, it is evident that currently OMKM is not expected to police compliance with conservation district rules and conservation district use permit conditions. OMKM also appears to have no authority to police what goes on inside the telescope facilities.

Additionally, OMKM acts in an advisory capacity to the University of Hawaii Board of Regents, and is ultimately a creature of the Regents. The Mauna Kea Management Board is appointed by the Regents, and the Regents have the power to discontinue the board and the office or to dramatically alter their functions and purposes. Under this current structure, there is no assurance that OMKM will continue to exist to promote good management and to protect the natural and cultural resources, especially if those goals clashed with the University's interest in promoting its astronomy program. As the Auditor's Report pointed out, the University's focus on pursuing the development of the summit for astronomical research to enhance the prestige of its astronomy program has been at the expense of protecting our natural resources.

We believe, however, that having an active and empowered OMKM will assure that the protection of our natural and cultural resources will have a prominent place in the University's management of the science reserve at the summit of Mauna Kea. To this end, we are requiring the continuance of OMKM and the Mauna Kea Management Board. In connection with its mission to "achieve harmony, balance and trust in the sustainable management and stewardship of the Mauna Kea Science Reserve through community involvement and programs that protect, preserve and enhance the natural, cultural and recreational resources of Mauna Kea while providing a world-class center dedicated to education, research and astronomy," we are tasking OMKM with a number of specific responsibilities pursuant to this permit. Should the University choose to discontinue OMKM or the Mauna Kea Management Board, or to dramatically alter their composition, functions, and purposes, that would be grounds for this Board to revisit and modify or revoke this permit.

We are also imposing regular reporting requirements on the University. Non-compliance with permit conditions sometimes results from inattention rather than conscious omission. By having to report on compliance efforts, the University will be forced into continual awareness of its obligations and continuous assessment of its progress.

The Auditor's report was also critical of DLNR for the lack of proper management of the summit of Mauna Kea. This Board acknowledges that mitigating the cumulative impacts anticipated by adding this project to the activities and facilities already existing within the science reserve also requires more rigorous enforcement on DLNR's part. We, therefore, charge the Department with taking a more active role in overseeing the management of the Mauna Kea summit area and to be more vigorous in taking enforcement action when any violation is brought to light, including the imposition of significant fines in appropriate circumstances.

Specifically, the Department shall take an active role in reviewing and commenting on such things as the historical and cultural education plan, the comprehensive and integrated resource management plan, which we are requiring under this permit. When the education plan is being implemented, i.e., when the workers are being trained, the Department should conduct random periodic visits to ensure that the plan is carried out as intended. We also expect the Department to seriously and carefully review all reports, including, but not limited to, annual project status reports, and to conduct random unannounced site visits periodically to ensure that permit and lease conditions are being complied with and the natural and cultural resources are being protected. When violations are brought to light, the Department should promptly report them to the Board with recommendations for enforcement actions. Inasmuch as the permittee is being required to file annual reports, we instruct the Department to schedule annual briefings for the Board on the then current status of this project and any outstanding issues.

This Board believes that compliance with the conditions attached to the permit would result in significant improvements in the management of the summit of Mauna Kea. The conditions provide for programs to promote environmental and cultural education and sensitivity for everyone involved with the project. Many of these management decisions are placed in the hands of the Office of Mauna Kea Management. Given that OMKM's mission is one of stewardship of the mountain, and given its close ties to the surrounding community, we believe that an empowered OMKM will ensure that the promotion of astronomy interests will never

again be at the expense of our natural and cultural resources. These conditions, together with the Department and the Board playing a more active role in oversight, management and enforcement, we believe will ensure the conservation, protection, and preservation of our important natural and cultural resources.

Environmental Impact Disclosure Documents

Because the construction of the outrigger telescopes will be funded by the National Aeronautical and Space Administration (NASA), federal law required an environmental impact disclosure document for that purpose. Under our state law, HRS chapter 343 required an environmental impact disclosure document because the project proposed the use of state lands that are in the conservation district. Although the law allows for the preparation of joint impact statements with concurrent review and public comment, HRS §343-5(f), the state law provisions for acceptance of the document and challenges to the acceptance still apply.

Parties not involved in this contested case challenged, under federal law, the environmental assessment prepared by NASA. However, there was no challenge to the environmental assessment under HRS chapter 343. For purposes of the conservation district use application, therefore, acceptance of the assessment and the finding of no significant impact became final, and this Board is without jurisdiction to overturn that. The applicant, having completed and complied with the requirements of HRS chapter 343, therefore, was entitled to move forward with the conservation district application process. There was no legal basis for the Board to suspend the CDUA process pending the challenge to the NASA environmental assessment.

We take official notice of the fact that the federal district court determined that the NASA's environmental assessment was inadequate in that it failed to address cumulative impacts. We also take official notice of the fact that, although not required by the federal court, NASA has decided not merely to supplement its environmental assessment, but to prepare an environmental impact statement.

Several of the intervenors in this contested case proceeding have urged the Board to, at least, defer making a decision on this application until NASA completes its EIS. Again, the Board lacks a legal basis for suspending action until completion of the NASA EIS. Moreover, we are mindful that under HRS §183C-6(b), the Board has only 180 days to act upon the application, unless the time period is extended upon the request of the applicant. If the applicant does not request an extension of time and the Board fails to act, the permit is deemed to be automatically granted.

In this contested case proceeding, there has been ample opportunity to raise issues that may not have been adequately covered in the environmental assessment document. It is apparent from the record that the issue of cumulative impacts has been addressed in this contested case. Having reviewed the record, the Board believes that the information regarding impacts was sufficiently developed through the contested case proceeding to enable us to formulate conditions to adequately mitigate impacts and, in turn, decide that this permit can be issued with assurance that the resources will be protected.

Although we do not anticipate that NASA's EIS process will uncover significant information that was not available to the Board, we recognize that, although unlikely, such a possibility exists. For that reason, we highlight in this case one of the standard conditions to conservation district use permits, to wit:

In issuing the permit, the department and board have relied on the information and data which the applicant has provided in connection with the permit application. If, subsequent to the issuance of the permit such information and data prove to be false, incomplete, or inaccurate, this permit may be modified, suspended, or revoked, in whole or in part, and the department may, in addition, institute appropriate legal proceedings[.]

In other words, if NASA's EIS reveals significant information that was unavailable to the Board or different from what was presented to the Board, the Board has the authority to reconsider this decision in light of that new information.

Conclusion

In light of the foregoing, and based upon the attached findings of fact and conclusions of law, the Board grants the application and issues the conservation district use permit subject to the special and standard conditions as set forth in the attached findings of fact, conclusions of law and decision and order.